The Central Law Journal.

ST. LOUIS, OCTOBER 6, 1882.

CURRENT TOPICS.

It is an important and interesting question, how far a court will be justified in the exercise of its summary jurisdiction, by striking an attorney from the rolls, for an offense which is merely a moral delinquency with no necessary connection with his official character as attorney. *In re* Henry Trumbore, recently decided by the Supreme Court of Pennsylvania, it appeared that the attorney, being suspected of an infamous criminal offense (of which, however, he was subsequently acquitted), namely, of complicity in procuring an abortion, had requested the District Attorney to give him time, that he might see the prosecutor and fix the matter up right. The court held that while such behavior on the part of a lawyer, whose knowledge on the subject is supposed to be critical, was improper and immoral, though he was under an accusation of crime, and, perhaps, conscious of innocence, still it would not justify striking him from the rolls.

The court had premised that "no doubt attorneys may be disbarred for other causes than unprofessional conduct as an officer. Thus, if convicted in due course of law of any offense of the species *crimen falsi*, the court would have a right to strike such convict from the roll of attorneys." Just what degree of moral delinquency, of an unofficial character, is sufficient to justify such action by the court is a question of manifest difficulties. It is one, too, upon which, be it said to the credit of the profession, the adjudications are very few. Among the earliest of these, is *Ex parte* Brounsal, Cowp. 829, decided in 1778. In that case the attorney had been convicted of stealing a guinea, and had been branded in the hand and suffered imprisonment. Upon a proceeding to strike him from the rolls, Lord Mansfield said that the application was not in the nature of a second trial or new punishment; but that the question was, "Whether, after the conduct of this man, it is proper that he should continue a member of a profession which should stand free from all suspicion." After consultation with all the judges, he announced their unanimous opinion, that he should be stricken from the rolls, saying: "And it is on this principle; that he is an unfit person to practice as an attorney. It is not by way of punishment; but the court in such cases exercise their discretion, whether a man whom they have formerly admitted is a proper person to be continued on the roll or not." In 1805, Lord Ellenborough disbarred an attorney who, it appeared, attempted to levy blackmail by threatening a prosecution, although he had been acquitted of the technical offense of attempting to extort money. The King v. Southerton, 6 East, 142. The fact that an attorney has been stricken from the rolls of another court, is of itself sufficient reason for the exercise of the discretion. *In re* Smith, 1 Brod. & B. 522. In the American case *In re* Mills (1 Mich. 392), decided in 1850, it was held that the charge that the reputation of an attorney for truth and veracity is so notoriously bad that he is not to be believed under oath, contains good cause for removal. And in Smith v. State (1 Yerg. 225), the Tennessee court struck the name of an attorney from the rolls on the ground that he had killed another in a duel. The opinions in both these last two cases are learned and interesting. See, also, *Re* McCarthy, 42 Mich. 71, which was the case of a man who had pleaded guilty to obtaining money under false pretenses.

The Supreme Court of the United States will reconvene on Monday, October 9th. It is expected that a full bench will be present at the assembling of the court. If the President is in town the court will meet and immediately adjourn to pay their respects to him, as has been the custom for years. The Tuesday following the work of the term will commence in earnest. The number of cases on the docket is closely in the neighborhood of one thousand. It is to be hoped that the matter will be borne in mind by Congress, and that some practical method of relief will be devised at the ensuing session. The need is urgent, and a time is rapidly approaching when the advocates of opposing plans must sacrifice their preferences in consideration that any relief is preferable to the present condition of affairs.

FEAR: ITS LEGAL LIMITATIONS.

A case of much interest, both psychological and legal, in which came up the question of freedom of will, was decided by the Supreme Court of Pennsylvania in March, 1882.[1] The question arose on a feigned issue framed to determine whether a judgment note given by the defendant, Mrs. Olive Elliott, had been extorted from her by duress. Mrs. Elliot, at the time of giving the note, which was for $7,419, was a widow of seventy-seven years. Her son, who resided with her, was indebted to the plaintiff, Thomas R. Jordan, to the amount of the note, and Mrs. Elliott, so she claimed, was induced to sign the note by what she considered to be a threat of a criminal prosecution of her son. "By the Eternal," so, she swore on the trial, Jordan addressed her, "if this thing is not settled to-day, I have my lawful remedy, and I will put your son in jail before night." This she construed to mean that criminal prosecution would be instituted against her son unless she signed the note. In her agitation she signed the note in her maiden name, which, however, she subsequently corrected. The next day, under the same influence, she signed a paper confessing judgment, she being at the same time told that this was a mere receipt. Her testimony was corroborated by several witnesses, but was denied in part by the plaintiff, who testified that he had used no undue influence to induce the defendant to sign the papers, of whose contents she was fully cognizant. On the trial the defendant was asked, *inter alia*, the following question: "Had you at the time of Jordan's visit, heard anything about his reputation for violence?" This was objected to, but the court permitted the question, and the answer was: "I had always heard that he was a violent man, but I never saw anything of it personally until that day." The court left to the jury the question whether "what she (the defendant, in signing the note) did, was the will of the person making the threats, and not her own will," this being "really the important part of the issue." The jury found for the defendant, and, on a writ of error to the Supreme Court, the judgment entered on this verdict in the court below, was affirmed.

[1] Jordan v. Elliott, 15 Cent. L. J. 232; s. c., 12 W. N. C. 56.

The rule, on the question of duress, is thus stated by Gordon, J., giving the opinion of the court: "Now, we are free to admit that, to a man of ordinary courage, this fuss and fume of Jordan might have been regarded as a mere farce, and would probably have been productive of a consequence no more serious than a summary and unceremonious ejectment of the intruder from the premises. But to this old lady, helpless as she was, and unprepared either to encounter or deal with such sham heroics, the matter was altogether different, and the jury were justified in believing that she was much frightened, and that her will was so controlled thereby that the obligation which she signed was not her free and voluntarily act. We are aware that neither under the rule of the civil nor common law, as formerly expressed, would there be sufficient to release Mrs. Elliott from her contract. For, according to Blackstone, the threats, to produce such an effect, must be of such a character as to induce a well-grounded fear in the mind of a firm and courageous man of the loss of life or limb; and the rule of the civil law was of like import; the fear must be of that kind which would influence a man of the greatest constancy, '*Metus non vani hominis, sed qui in homine constantissimo cadat.*' As we have already said, the fantastic heroics of Jordan would not have been sufficient to induce a courageous man to do that which he was not disposed; hence, if this rule is to be applied to the case in hand, the defense is insufficient. But, fortunately for the weak and timid, courts are no longer governed by this harsh and inequitable doctrine, which seems to have considered only a very vigorous and athletic manhood, overlooking entirely women and men of weak nerves. Pothier regards this rule as too rigid, and approves the better doctrine, that regard must be had to the age, sex and condition of the parties. Since that fear, which would be insufficient to influence a man in the prime of life, and of military character, might be deemed sufficient to avoid the contract of a woman or man in the decline of life.[2] And we think the opinion of Mr. Evans expresses the doctrine which is now approved by the judicial mind, both of this country and of England, that is, that any contract produced by actual intimidation

[2] Evans' Poth. on Oblig., I., 18.

ought to be held void, whether, as arising from a result of merely personal infirmity, or from circumstances which might produce a like effect upon persons of ordinary firmness."

Notwithstanding the high authority of Blackstone, it is far from being clear, as is stated in the above extract, that fear, to be a defense must, by the Roman law, be such as would "influence a man of the greatest constancy." It is true that this view was taken by the scholastic jurists of the middle ages. In that period of purely speculative jurisprudence, when there was little business to come before its courts, and, in fact, no courts, in our sense of the term, to direct litigation, the provinces of law and fact were blended, and an ideal man, with certain fixed characteristics, was assumed to exist, with whose attributes all persons in all supposed future issues were clothed. The degree of courage and of common sense, and of perspicacity possessed by this ideal person were arbitrarily assumed to be possessed by the parties to the numerous hypothetical cases the jurists were in the habit of putting; and what this ideal person was capable of doing or seeing was assumed to be within the range of the capacity of all other persons in the same circumstances. This, however, was not the conclusion of the jurists who determined the law of business Rome. In the Corpus Juris, so far from being told that fear, to be an excuse, or to be regarded as suspending free agency, must be fear to which a courageous and intelligent man would yield, we have read rulings to the effect that each case of duress is to be determined by taking into consideration the peculiar temperament and experience of the person to whom the duress is applied.[3] There must, undoubtedly, to make duress a defense, so the Roman law holds, be fear of physical violence to the party threatened, or to one of his immediate family, producing nervous paralysis. That a contract is made under fear alone, is not ground for avoiding it, for, if so, few contracts would stand. But when fear of physical violence to the party himself, or to one of his family, is set up, then the reality of this fear is to be tested from the standpoint of such party. The law is thus summed up by an intelligent commentator; "*Metus autem causa abesse videtur, qui justo timore mortis, qel cruciatus corporis conterritus abest; et hoc ex affectu ejus intelligitur.*"[4] Or, as it is acutely put by a recent German author,[5] the question is the efficiency of the threat. If likely to be effective in destroying a free agency of the party threatened, then the defense of duress will be made out. "It is important in this view," so proceeds this able writer, "to consider the physical conditions of the party threatened, involving the questions of age, sex, education, experience, and health, in order to determine whether the threat was effective."

A similar question arises in criminal law, and is discussed by me in detail in the eighth edition of my work on that branch of jurisprudence.[6] Is the danger that excuses the homicide of an assailant to be viewed (1) from the defendant's standpoint; or (2), from the standpoint of the jury, with all the facts before them; or (3), from the standpoint of an ideal reasonable man? No doubt we have very high authority to the effect that unless the defendant's fear is "reasonable" in one of the two latter senses, it should not avail.[7] It is certainly clear that an erroneous idea of danger, when negligently adopted, so far from being an absolute defense to an indictment for homicide, perpetrated under the influence of such fear, would be ground for a verdict of manslaughter. On the other hand, I apprehend that the great weight of authority now is to the effect that an honest non-negligent belief of danger to life will be an excuse to a homicide committed under such fear. The leading case on this topic, that of Levett,[8] was that of a man suddenly roused from his sleep by a noise in the kitchen, and supposing a burglar to be in the house, killing the supposed burglar, who was in fact only a visitor of one of the servants. This was held to be an excusable homicide, though Foster properly says, in his criticism of the case, that if Levett had negligently come to this conclusion, the case was one of manslaughter. This case has been followed by many others in which this, which may be

[3] See L. 3. D. *ex quib. caus.* (4.6); L3. 11-D. *quod metus cause* (4.2); L. 7 C. *de usquæ vi.* (2.20).

[4] *Gail, Obs. Lib. II. obs.* 93.

[5] Koch, Ford. II. 107.

[6] Whart. on Crim. Law, secs. 488, *et. seq.*

[7] See Commonwealth v. Hilliard, 2 Gray, 294; State v. McGreer, 13 So. Car. 464; Wesley v. State, 37 Miss. 327.

[8] Foster's Crim. Law, 294.

called the subjective test, is followed, and in which it is held that the reality of the fear is to be determined from the standpoint of the party accused. In Pennsylvania, in particular, very able judges, masters of criminal law, have laid down this position with great emphasis, it being there held that the issue is, not what the jury, with all the evidence before them, would believe, or what would an ideal reasonable man believe, but what was the belief of the defendant himself. It is true if he negligently believed in extreme danger, he should be convicted of manslaughter. But if he non-negligently came to this belief, and killed his assailant under this conviction, the belief being that this was the only way of saving his own life, or of preventing a great felony on his person, then the case is one for an acquittal.[9] The same rule obtains in cases of rape and robbery.

Not less interesting is the ruling of the court in the case immediately before us, that it was admissible to prove by Mrs. Elliott that she had heard that Jordan had a reputation for violence. "This," said Judge Gorden, giving the opinion of the Supreme Court, "was altogether proper; not, indeed, as proof of character, for that was not in question; but as a circumstance affecting the defendant; as showing her conviction that she was dealing with a dangerous man, whose will it would not be safe to resist." Analogous rulings have been made in criminal law, though this, also, is one of the great controverted issues in this branch of jurisprudence. In Massachusetts, in face of the ruling in Selfridge's case, that the jury, in cases where self-defense is set up, are to take into consideration the strength and other qualities of the parties, it has been held inadmissible to show "that the general character and habits of the deceased were those of a quarrelsome, fighting, vindictive and cruel man of great strength, as a circumstance tending to show the nature of the provocation under which the defendant acted, and that he had reasonable cause to fear great bodily harm."[10] Now it may be that the rejection of the offer may be sustained on the ground that it was not claimed that the defendant had knowledge of these proclivities of the deceased; though this reason is not given by the court. But if we can account for the ruling in Hilliard's case on this ground, there is no ground whatever on which we can sustain the ruling in Mead's case,[11] in which it was held inadmissible to prove that the deceased was "very strong and muscular." This was a condition of which the defendant, at the encounter, must necessarily have had greater or less notice, and which, when he was attacked, formed an important ingredient in the reasoning by which he was to decide whether his life was in peril, and in direct antagonism to this ruling may be cited a number of decisions in which it has been held admissible for the defense, when self-defense is set up, and when an attack on the defendant by the deceased is shown, to put in evidence the deceased's character for violence nature, and knowledge thereof by himself.[12]

In civil issues, we have rulings to the same effect. The notoriety of a usage may be proved in order to affect a party with notice of such usage;[13] and one of the reasons for which reputation is permitted to be put in evidence in certain lines of torts, is that the opposing party ought to be judged in his conduct to the party offering the evidence, by what the latter must be supposed to have

[9] Logue v. Commonwealth, 38 Pa. St. 265; Commonwealth v. Carey, 2 Brewst. 401; Commonwealth v. Seibert, Whart. on Hom. (2d ed.), sec. 507; charges of Judge King, reported in same volume. That this view is taken in England, see R. v. Thurboon, 1 Den. C. C. 388; R. v. Scully, 1 C. & P. 319; and see Selfridge's Case, reported in appendix to Whart. on Hom.; Commonwealth v. Woodward, 102 Mass. 155; People v. Lamb, 2 Keyes, 360; Grainger v. State, 5 Yerg. 459; State v. Williams, 3 Heisk. 376; Ted v. State, 22 Ga. 75, and other cases cited, Whart. Cr. L. (8th ed.) sec. 490.

[10] Commonwealth v. Hilliard, 2 Gray, 294.

[11] 12 Gray, 168.

[12] R. v. Lynch, 5 C. & P. 324; People v. Lamb, 2 Keyes, 364; Pfomer v. People, 4 Parker C. R. 558; McKenna v. People, 18 Hun, 580; Eggler v. People, 56 N. Y. 642; State v. Tellers, 2 Halst. 230; Pennsylvania v. Robertson, Add. 246; Commonwealth v. Seibert, Wharton on Hom., sec. 506; Commonwealth v. Ferrigan, 44 Pa. St. 386; Bottoms v. Kent, 3 Jones, 154; State v. Hogue, 6 Jones, 381; State v. Smith, 12 Rich. 430; Monroe v. State, 5 Ga. 85; Quesenberry v. State, 3 St. & P. 308; Pritchett v. State, 22 Ala. 39; Dupree v. State, 33 Ala. 380; Fields v. State, 47 Ala. 603; Eiland v. State, 52 Ala. 325; Bowles v. State, 58 Ala. 335; Dubes v. State, 11 Ind. 557; Holler v. State, 37 Ind. 57; People v. Lilly, 38 Mich. 270; State v. Collins, 32 Iowa, 36; State v. Keene, 50 Mo. 357; State v. Bryant, 55 Mo. 75; People v. Edwards, 41 Cal. 440; Stevens v. State, 1 Tex. App. 591; Hudson v. State, 6 Tex. App. 365.

[13] Sheen v. Bumpsteed, 2 H. & C. 193; Lee v. Kilburn, 3 Gray, 594; Adams v. State, 25 Ohio St. 584; Benoist v. Darby, 12 Mo. 196; Ward v. Herndon, 8 Port. 382; Stallings v. State, 33 Ala. 425.

known of the former.[14] Common rumor of the plaintiff's guilt, also, is admissible, cumulatively, for the defendant in an action of malicious prosecution;[15] and reasonable cause, also, to believe that a party is insolvent, may be proved by general reputation to this effect.[16] On the question, also, whether a railroad officer acted prudently at the time of a collision, cries of third parties can be proved without producing such parties;[17] and when the question is whether a bankrupt has denied himself, answers given at his door, denying him, can be proved without calling the persons who gave the answers.[18] I think, therefore, that it is clear that the mere fact of the non-production of the parties who told Mrs. Elliott of the reputation of Jordan for violence, was no ground for the exclusion of such evidence; and the only question, therefore, supposing that Mrs. Elliott had notice of such violence of disposition, was whether it was a material fact in determining whether she was acting, when signing the paper in litigation, under duress. And that it was material, the considerations I have noticed above go to show.

FRANCIS WHARTON.

Narragansett Pier.

[14] See Whart. on Ev., sec. 252.
[15] Pullen v. Glidden, 68 Me. 559.
[16] Bartlett v. Decreet, 4 Gray, 111; Heywood v. Reed, 4 Gray, 574.
[17] Whart. on Ev., sec. 255.
[18] Crosby v. Percy, 1 Taunt. 364.

MALICIOUS PROSECUTION.

When a person has been charged with a criminal offense, and been tried and acquitted, the first thing that the defendant thinks of, or is persuaded to think of, is whether he can not turn his misfortune to some advantage, and turn the tables on the prosecutor. It is too easily assumed by the acquitted defendant that because he has been acquitted, the other party must have been altogether in the wrong, and may be brought in turn to justice. But at this stage he encounters several difficulties. He finds out that it is not enough that he has been acquitted; but that he must show something, very difficult to show in most cases, namely, that the prosecutor was animated by pure spite or malice, and that he had no reasonable and probable cause for the accusation. Indeed, sometimes he is met by a further difficulty, namely, that he may have no opponent at all to attack, for there may be no prosecutor, in the common acceptation of the term, but the law may have been set in motion by some official who can scarcely be got at owing to the protection surrounding him.

This last point has given rise to many nice questions. It is often the case that the leading witness, on whose evidence the accusation rested, was nothing more than a witness, and if so he is invulnerable. In a case of Darby v. Dearsley,[1] where a master had given a servant into custody for stealing some clippers from his stable, the defense was that the defendant was not the prosecutor. The court said that there was not in the books any express authority as to what a prosecutor was. He might be instrumental in putting the law in force. But all that this defendant had done was to state what he knew to the constable, and then what followed as to the arrest and charge was the act of the constable. As Lindley, J., put it, "It has been said that the defendant so acted that he intended the plaintiff to be arrested by the constable, or as it was said, to use the common phrase, he set the stone rolling. Now what stone has he set rolling? It is simply a stone of suspicion. There was no direction to the constable to arrest and prosecute. He no doubt suspected the plaintiff and described the things to the constable, but there is not the slightest evidence that the defendant either prosecuted or directed any one else to prosecute."

One noted class of cases where this kind of difficulty is found is where a prosecution for perjury is ordered by a judge. In Fitzjohn v. Mackinder,[2] an important question arose as to whether the defendant was liable to such an action when the county court judge directed the plaintiff to be prosecuted, and made an order to that effect pursuant to the statute 14 & 15 Vict., c. 100, s. 19. The case went to the Exchequer Chamber, and the judges were divided. Three, being the majority, held that though the judge ordered the prosecution, yet this was done as a consequence of the false swearing of the defendant, and that the defendant had by his perjury procured the order of the court. On

[1] 43 L. T. (N. S.) 603.
[2] 9 C. B. (N. S.) 505.

the other hand, the two judges in the minority held that the defendant was a mere witness and nothing more, and was not responsible for the judge making the order, and which order was, according to the jury, a mistake of the judge's own, and not of the defendant's.

As, however, there are many cases of malicious prosecution where the difficulty as to who is the prosecutor is not raised, it is next to be considered what the plaintiff is obliged to make out in order to succeed in this action. A leading case was decided in 1870 of Lister v. Perryman,[3] and, being by the House of Lords, is of the highest authority. It was an action for false imprisonment, and not for malicious prosecution, the burden of proof being different in the two cases, but the substantial defense is much the same. Perryman was a ranger, and had been charged with stealing a rifle of the defendant, Lister. One Hinton, the coachman of Lister, told his master that another man, Robinson, had seen this rifle in Perryman's barn; that Robinson and Hinton had gone to Perryman and taxed the latter with having the rifle; that Perryman denied it, and produced a rifle which was not that which the man Robinson had seen in Lister's barn. Perryman was given into custody, but discharged by the magistrate, and then an action was brought for false imprisonment. Lord Chelmsford said the question was not whether the master might have obtained more satisfactory grounds of belief by applying to Robinson for direct information, but whether the facts brought to his knowledge furnished reasonable and probable cause for his believing that the plaintiff had dishonestly possessed himself of his rifle, and justified him in acting in that belief without further inquiry. The master had information both from his servant Hinton and from Robinson that the missing gun had been seen in the possession of Perryman, though Perryman denied it, and said it was another gun. The question thus came to be, as Lord Chelmsford said, whether in an action like that for a malicious prosecution where a person is proved to have acted upon the information of a trustworthy informant, he can be said to have acted without reasonable and probable cause because he has not make inquiry of some one else who could have repeated and confirmed what was told him. And Lord Westbury said it was not law that you can never proceed on hearsay evidence when you have a good opportunity of testing the accuracy of the hearsay evidence by examing the person who is represented to have said such-and-such things. In that case, the result was that a new trial was directed, and it was laid down that a prosecutor may act honestly and with reasonable and probable cause, though he proceeded solely on hearsay evidence; and, indeed, it is often impossible to do otherwise in a great majority of cases, than proceed on the faith of such hearsay statements.

An important contribution to the learning of this subject has recently been made in the case of Hicks v. Faulkner.[4] The defendant was a landlord of a house in a London suburb, and the father of the plaintiff was tenant of the house. In February, 1879, the defendant, as landlord, sued for rent in the county court. The defense was, that before the rent became due the plaintiff surrendered possession, and the key of the house was delivered to and accepted by the defendant. To support this defense the plaintiff was called as witness for his father, and swore that he, at the defendant's request, gave up the key to the defendant. This was a material fact, if proved. After the determination of the action the defendant caused the plaintiff to be indicted for perjury, and the plaintiff was acquitted, and then commenced this action for malicious prosecution. At the trial the defendant denied the plaintiff's statement about giving up the key, and in confirmation of his testimony referred to his diary and other corroborating circumstances. Huddleston, B., the judge, after stating the more simple suppositions as to the law of the case, told the jury that it might be that they would come to the conclusion that the plaintiff did, in fact, deliver up the key as he swore, and that the defendant had a very treacherous memory and had forgotten all about it, and went on with the prosecution under the impression that he had never had the key. Nevertheless, if that was an honest impression, the upshot of a fallacious memory, and acting upon it he honestly believed the plaintiff had sworn falsely and corruptly, no jury would be justified in saying that the defendant ma-

[3] L. R. 4 H. L. C. 535.

[4] 14 Cent. L. J., 298.

liciously and without reasonable or probable cause prosecuted the plaintiff, because the best probable and reasonable cause would be that he honestly believed it. The jury returned a verdict for the defendant.

A new trial was afterwards moved for on the ground of misdirection. The main contention of the plaintiff's counsel was, that where a defendant relies on his memory for the facts which go to make up probable cause, he must prove to the satisfaction of the jury that his memory of the facts was accurate, and he must stand or fall by its accuracy. He must take the risk of his forgetfulness, and it was no excuse to say that his memory was treacherous. The court, consisting of two judges, Huddleston, B., and Hawkins, J., examined this position carefully as to the treacherous memory, and a most interesting review of that faculty was given so as to determine whether a man might honestly be led astray by it. On this subject, Hawkins, J., in the judgment thus put the matter. The question of reasonable and probable cause depends in all cases, not upon the actual existence, but upon the reasonable *bona fide* belief in the existence of such a state of things as would amount to a justification of the course pursued in making the accusation complained of. It can not, of course, be laid down as an abstract proposition that an accuser is justified in acting either upon the credited statement of an informant or upon his own memory. The question must always arise according to circumstances whether it was reasonable to trust either the one or the other. A person who acts upon the information of another, trusts the veracity, the memory and accuracy of that other, in each of which he may be completely deceived; his informant's veracity may be questionable; his memory fallacious, and his accuracy unreliable; yet it does not follow that it was unreasonable to believe in his information, if he never had cause to doubt him. In like manner, a man may be deceived by his own memory, yet it does not follow that it was unreasonable to trust it, if he never before knew it to be defective. Why, if he may rely upon the memory of another, may he not rely upon his own? The reasonableness or otherwise of their reliance is for the jury to determine.

The upshot of the learned judgment was, that a man may be very honest and reasonable, and yet have a slippery memory, and he ought not to be made responsible for the slip. This is a conclusion which most people have arrived at for themselves. The new trial was accordingly refused; and on appeal the judges held that they could not see anything wrong in what had been laid down on this matter by the judge at the trial, and by the Queen's Bench Division on the motion for a new trial.

The point is one of considerable value in a practical point of view. The world abounds in slippery memories, and it is to be feared that this decision will give too great encouragement to the slippery tribe of witnesses. Nevertheless, there will be always a jury to check any abuse of this tendency, and with this qualification we can not help feeling some relief that the *non mi ricordo* defense will sometimes win in these speculative actions.—*Justice of the Peace.*

NEGLIGENCE—SALE OF DANGEROUS ARTICLES TO CHILDREN.

BINFORD v. JOHNSON.

Supreme Court of Indiana, September 15, 1882.

Where the defendant sold two boys, aged respectively ten and twelve years, pistol cartridges loaded powder and ball for use, in a toy pistol, such sale being contrary to a statute in was held that such sale was also negligent, and that the accidental wounding of one of the boys by his younger brother in playing with them was the material and probable consequence of defendant's act.

Appeal from Montgomery Circuit Court.

ELLIOTT, J., delivered the opinion of the court:

The case made by the appellees complaint briefly stated is this: Two sons of appellee, Allen and Todd, aged twelve and ten years respectively, bought of the appellant, a dealer in such articles, pistol cartridges loaded with powder and ball. The boys purchased the cartridges for use in a toy pistol, and were instructed by appellant how to make use of them in this pistol. The appellant knew the dangerous character of the cartridges, knew the hazard of using them as the boys proposed, and that the lads were unfit to be intrusted with articles of such a character. Shortly after the sale the toy pistol loaded with one of the cartridges was left by Allen and Todd lying on the floor of their home. It was picked up by their brother Bertie, who was six years of age, and discharged the ball, striking Todd, and inflicting a wound, of which he died.

A man who places in the hands of a child an article of a dangerous character, and one likely

to cause injury to the child itself, or to others, is guilty of an actionable wrong. If a dealer should sell to a child dynamite, or other explosives of a similar character, nobody would doubt that he had committed a wrong, for which should answer in case injury resulted. So if a druggist should sell to a child a deadly drug, likely to cause harm to the child. or injury to others, he would certainly be liable to an action.

The more difficult question is, whether the result is so remote from the original wrong as to bring the case within the operation of the maxim *causa proxima et non et remota spectatur*. It is not easy to assign limits to this rule, nor to lay down any general test which will enable courts to determine when a case is within or without the rule. It is true that general formulas have been frequently stated, but these have carried us but little, if any, beyond the meaning conveyed by the words of the maxim itself.

The fact that some agency intervenes between the original wrong and the injury, does not necessarily bring the case within the rule. On the contrary, it is firmly settled that the intervention of a third person, or of other, and new direct causes does not preclude a recovery, if the injury was the natural or probable result of the original wrong. Billman v. Indianapolis, etc. R. Co., 76 Ind. 166. This doctrine remounts to the famous case of Scott v. Shepherd, 2 Black, 892, commonly known the "Squib case." The rule goes so far as to hold that the original wrong-doer is responsible, even though the agency of a second wrong-doer intervened. This doctrine is enforced with great power by Cockburn, C. J., in Clark v. Chambers, 7 C. S. J., and is approved by the text-writers. Cooley on Torts, 70; Addison on Torts, sec. 12.

Although the act of the lad, Bertie, intervened between the original wrong and the injury, we can not deny a recovery if we find that the injury was the natural or probable result of appellant's original wrong. In Henry v. Southern Pacific R. Co., 50 Cal. 176, it was said: "A long series of judicial decisions has defined proximate, or immediate and direct damages to be the ordinary and natural results of the negligence, such as are usual and probable, and might, therefore, have been expected." Lord Ellenborough said in Townsend v. Walthen, 9 East. 280, that "Every man must be taken to contemplate the probable consequence of the act he does."

In Billman v. Indianapolis, etc. R. Co., *supra*, very many cases are cited declaring and enforcing this doctrine, and we deem it unnecessary to here repeat the citations. Under the rule declared in the cases referred to, it is clear that one who sells dangerous explosives to a child, knowing that they are to be used in such a manner as to put in jeopardy the lives of others, must be taken to contemplate the probable consequences of his wrongful act. It is a probable consequence of such a sale as that charged against appellant, that the explosives may, and will be so used by children among whom it is natural to expect that they will be taken, as to injure the buyers or their associates. A strong illustration of the principal here affirmed is afforded by the case of Dixon v. Belle, 5 M. & Sel. 198. In that case, the defendant sent a child for a loaded gun, desiring that the person who was to deliver it should take out the priming; this was done, but the gun was discharged by the imprudent act of the child, the plaintiff injured, and it was held that the defendant was liable.

In Lynch v. Amdein, 1 Q. B. 29, the doctrine of the case cited was approved, and the same judgment has been pronounced upon it by other courts, as well as by the text-writers. Carter v. Town, 98 Mass. 567; Whart. on Negl. 851; Sher. & Redf. (3d ed.), 586.

There is no such contributory negligence disclosed as will defeat a recovery. The age of the lads who bought the cartridges, the use the appellant knew they intended to make of them, and the fact that they did use them as instructed by him, are all important matters for consideration upon the question of contributory negligence. There are very many cases holding that the age of the child is always to be taken into account, and that what would be negligence in an adult will not be negligence in a young lad.

The Supreme Court of the United States thus states the rule: "The care and caution required of a child is according to his maturity and capacity only, and this is to be determined in each case by the circumstances of that case." R. Co. v. Stout, 17 Wall. 657. It must be the law in cases of this nature that the age of the child shall be considered, or it must follow that a vendor of the most dangerous explosives may sell them as freely to young children as to men of mature years, and this surely would be a result which no reasonable man would undertake to support.

In Potter v. Faulkner,1 B. & S.805, Erle, Ch. J., said: "The law of England in its care for human life, requires consummate caution in the person who deals with dangerous weapons." And we think it may with equal truth be said that the common law both of England and America requires of him who deals with dangerous explosives to refrain from placing them in the hands of children of tender age. If the child is too young to know the character of the thing sold him, it is the business of the dealer to refuse to sell him articles likely to put in jeopardy his own or some other person's life.

Where one sells another a dangerous instrument, and that other is ignorant of its true character, and this the seller knows, he is responsible for injuries resulting from the negligent use of the instrument. There are many well reasoned cases which, carrying the doctrine still further, hold that one who places a dangerous thing in a position where it is likely to cause injuries to others, is liable to a child who is injured, although he may be a trespasser. Bird v. Holbrook, 4 Bing. 628; State v. Moore, 31 Conn. 479; Berge v.

Gardner, 19 Conn. 507 Lynch v. Amdein, *supra;* Kerr v. O'Connor, 63 Pa. St. 342; Kieffe v. Milwaukee, etc. Co., 21 Minn. 207; Railroad Co. v. Stout, *supra.*

The case in judgment does not require us to carry the rule to the extent which is done in the cases cited. Here the appellant with full knowledge of the character of the cartridges, and fully informed as to the use the lads intended to make of them, placed these dangerous instruments in their hands, and he can not now escape liability upon the ground that the boys had no right to buy or use such articles. Nor can he escape upon the ground that the loaded pistol was left lying where the young child Bertie could reach it. One who deals with children must anticipate the ordinary behavior of children. The appellant was bound to take notice of the natural conduct of lads, like those to whom he sold the cartridges, and it can not be justly said that the acts of the lads in carrying the pistols with them to their homes and leaving it upon the floor within reach of their brother and playmate was an unnatural or improbable one.

It is contended that the complaint is bad, because it does not state who were the next of kin of the deceased, Todd Johnston, and we are referred to Cincinnati, etc. R. Co. v. Chester, 57 Ind. 297, 304; Pittsburgh, etc. R. Co. v. Vinning's Admr., 27 Id. 518; Indianapolis, etc. R. Co. v. Kelley, 23 Ind. 136; Gann v. Worman, 69 Id. 458. We do not think that these cases support the attack upon this complaint. It is in two paragraphs, and the demurrer is to the entire complaint, so that if one is good, the demurrer is not well taken. In the second paragraph, it is explicitly set forth that the appellee was the father of the deceased; that he expended money in and rendered services in endeavoring to secure a cure of his son; that he lost his services and society from the time he was wounded until his death. These allegations bring the case within the rule that money expended in the effort to cure a wound wrongfully caused by the act of another. Cincinnati, etc. R. Co. v. Chester, 57 Ind. 297; Cooley on Torts, 262. The right of action for the death is a statutory one, and is distinct and different from the personal right in the father recognized by common law. The complaint shows a right to some relief, and this gives it sufficient strength to withstand a demurrer. Bayless v. Glenn, 72 Ind. 5.

Additional strength is added to one at least of the paragraphs of the complaint by the facts stated in it showing that the cartridges were sold in violation of an express statute of the State. By an act passed in 1875, and incorporated into the revision of 1881 as sec. 1986, it is made a misdemeanor to "sell, barter, or give to any person under the age of twenty-one years any cartridges manufactured and designed for use in a pistol." In placing the cartridges in the hands of the lads, Allen and Todd, the appellant did an unlawful act, and, under settled principles, is liable for the consequence, naturally and proximately resulting from his unlawful act. In Weick v. Sander, 75 Ill. 93, it is held that, where an act unlawful in itself is done from which an injury naturally may and reasonably be expected to result, the injury when it occurs, may be traced back and visited upon the original wrongdoer. In the course of the opinion and as a commentary upon cases reviewed, it is said: "The principle announced is, that whoever does an unlawful act is to be regarded as the doer of all that follows." The decision in the case cited is well sustained; it finds support from the cases heretofore cited, as well as from the following and many others: Greenland v. Chaplin, 5 Exch. 243; Rowell v. Dewey, 3 Cush. 300; Sherden v. Brooklyn, etc. Co., 36 N. Y. 39; Griggs v. Flechensteno, 14 Minn. 81; Wellington v. Donier Kerosene Co., 104 Mass. 64; Farrant v. Barnes, 11 C. B. (N. S.) 533.

Appellant attacks one only of the instructions given by the court. The instruction assailed reads thus: "I instruct you that a sale of cartridges, in violation of a criminal statute of the State, would be of itself an act of negligence, and if you find from the evidence in this case that the defendant sold the cartridges as alleged in the complaint, such sale is an act of negligence on his part, and you will have no further trouble on this point." The sole objection stated is that the court had no right to declare that the sale of the cartridges, in violation of law, was an act of negligence. The only case cited in support of appellant's position is the case of Weick v. Sanders, from which we have quoted, and it makes against rather than for appellant. When a party does an act in direct violation of a positive statute, the court is justified in characterizing it as an act of negligence. It is in general true that negligence is a question of fact, but this is not universally true. Judge Cooley has examined this question, and with ability and vigor discussed it. In the course of the discussion he says: "Many cases clearly present mere questions of law, and that such are the cases of the disregard of a law expressly desired to prevent the like injury. An instance is that of the failure of a railway train to come to a stop before crossing another road, as is required by the statute in some States, whereby another train is run into. Here the negligence is plain, but it might happen that some parties injured by it would, by their own negligence, be precluded from any redress. The case would be equally clear, if the railway company were to send out a train without brakes, and thereby an injury should result through the impossibility of stopping a train when a danger appeared; or if one were to set a bon-fire in a town while a fierce wind was raging; or if he were to send a package of dynamite by express without disclosing its dangerous nature, concerning such cases no one should be in doubt." Cooley's Torts, 670. The principle that the court may, as matter of law, instruct the jury that an act constitutes negligence is illustrated by many cases in our own reports.

Thus, it has often been held that it is the duty of the court to instruct the jury that it is negligence for a corporation to make a dangerous excavation in a public street and leave it unguarded. So, in relation to the duties of a railroad corporation, the court often declares to the jury what act will constitute negligence, and this holds good of instructions upon the subject of persons attempting to cross railroad tracks. But without prolonging this opinion we refer without comment to Railroad v. Stout. 17 Wall. 657; Ohio, etc. R. Co. v. Collain, 73 Wall. 261; Pittsburg, etc. R. Co. v. Williams, 77 Ind. 462; L. & C. Co. v. Richardson, 63 Ind. 43.

It must not be left out of mind that the instruction does not affirm that there may be a recovery, but simply declares that it is negligence for a person voluntarily to do an act in direct violation of a statute.

In a case where there is evidence tending to show some excuse for doing an act prohibited by statute, it might, perhaps, be necessary to qualify the instruction, but there was here no such evidence, and it is to be remarked the instruction refers, when taken—as it must be—as an entirety, to such a sale as that charged in the complaint, thus limiting the general proposition to the particular case. The appellant asked the court to instruct the jury that if the sale was to Todd Johnston, and not to him and his brother jointly, that there could be recovery. We think this instruction was properly refused. It was sufficient for the appellee to sustain the substance of the issue tendered by him. It was not material whether the boys joined in buying the cartridges; if the sale was to one of them, it was an actionable wrong. Judgment can not be reversed for an immaterial variance; it is only where the issue in its general scope is not sustained, that a reversal will be adjudged. Rev. Stats., sec. 393.

Instructions numbered ten and fifteen asked by the appellant are substantially the same; and, as the former was given by the court, it was proper to refuse the latter. It is not error to refuse an instruction when another embodying the same matter has been given.

The other questions presented upon the instructions are disposed of in our discussion of the sufficiency of the complaint.

Judgment affirmed.

CONSTITUTIONAL LAW — JURY TRIAL— EMINENT DOMAIN.

CENTRAL BRANCH UNION PACIFIC R. CO. v. ATCHISON, ETC. R. CO.

Supreme Court of Kansas, September, 1882.

1. While it is undoubtedly true that a statute may be constitutional in one part and unconstitutional in another, yet this rule obtains only where the two parts are separate and independent. And where they are so related that the latter is a condition of, a compensation for, or an inducement to the former, or where it is obvious that the legislature, having respect to opposing rights and interests, would not have enacted one but the other, then the unconstitutionality of the latter avoids the entire statute.

2. The power of eminent domain is not granted by the Constitution to the legislature. It inheres in every State by virtue of its sovereignity, and the law-making body has the fullest liberty in the exercise of this power, except as specially restricted by constitutional provisions.

3. The constitutional guarantee that the right of trial by jury shall be inviolate imposes no restriction on the exercise of eminent domain.

4. A statute which, providing for the exercise of the power of eminent domain, grants to certain commissioners the right of determining the amount of compensation to be paid for land appropriated, and makes their award final as to the amount of such compensation, infringes no constitutional guarantee, and as the legialsture may make such award final without any opportunity of appeal or re-trial, it may grant to the land owner the privilege of appeal and of further trials upon conditions.

5. The legislature of 1870 enacted a statute which authorized, upon the application of a railroad company, the appointment of commissioners to assess damages caused by the appropriation of land for the right of way, and required the company to deposit the amount of such award with the county treasurer, subject to the order of the land owner. It further provided that the land owner might appeal from such award, but that such appeal should only be as to the amount of damages, and should not delay the prosecution of the work, and that the railroad company, upon giving a bond conditioned for the payment of all damages which should finally be recovered, might enter upon the land and construct its road: *Held*, that such statute was valid; that the occupation by the railroad company pending the appeal was provisional only, and that the land owner seeking to avail himself of the appeal must take it subject to the conditions imposed by the legislature.

Error from Atchison County.

Everett & Waggener for plaintiff in error; *Geo. R. Peck, A. A. Hurd* and *Tomlinson & Griffin* for defendant in error.

BREWER, J., delivered the opinion of the court:

The Atchison, etc. R. Co., defendant in error, instituted proceedings to condemn certain lands owned by the Central Branch Union Pacific R. Co., plaintiff in error, in the county of Atchison, and to that end procured the appointment of three commissioners by the judge of the district court. These commissioners duly discharged their duty, assessed the damages and filed their report with the county clerk on the 24th day of January, 1882. On the same day, the defendant company deposited with the county treasurer of Atchison county, $3,600, the amount of damages awarded to the plaintiff company. The plaintiff company filed its undertaking for appeal from the award and assessment of said commissioners; and thereupon the defendant company executed and filed its undertaking under sec. 86, chap. 23, Comp. Laws 1879, to pay all damages and costs which said

company might be adjudged to pay by said district court. Thereafter, said defendant company being about to enter upon the land, the plaintiff company applied for a temporary injunction. After a hearing the district court refused the injunction, to reverse which ruling the plaintiff company brings the case here.

The single question presented is as to the constitutionality of that part of said sec. 86, which authorizes a railroad company, notwithstanding the appeal, to take possession of and use the land, and construct its road over the same; and its unconstitutionality is claimed on the ground that it conflicts with sec. 4, art. 12 of the State Constitution, which provides: "No right-of-way shall be appropriated to the use of any corporation until full compensation therefor be first made in money or secured by a deposit of money to the owner."

It is contended on the one side, that the language of the Constitution is clear and unambiguous; that its provisions are absolute and controlling; that no argument from inconvenience can make against the controlling force of those provisions; that before any land can be appropriated, the compensation therefor must be paid in money or secured by a deposit of money; that the giving of a bond is in no sense the payment of money or the deposit of money; that when the assessment is appealed from, that assessment is vacated and there remains no determination of the compensation which is to be paid, and until the amount of that compensation is determined, it is impossible to say what amount of money should be tendered or deposited. Thus in the case at bar, though $3,600 in money was deposited with the county treasurer, no one can say that it will be finally determined that that amount is full compensation. It means that which is in fact full compensation, and not what it is conjectured may thereafter be found to be full compensation. The Constitution is not satisfied by a deposit of an amount of money supposed to be large enough to cover the compensation which may thereafter be found to be full, but requires payment or deposit of an amount which is at present known and determined to be full. On the other hand, the argument is that the power of eminent domain is not granted by the Constitution to the State; that it is a power which inheres in every State as one of the attributes of sovereignty; that the provisions of the Constitution simply restrict the exercise of that power, and that except as restricted thereby, the power of the legislature is supreme; that this power may be exercised by the State directly, or delegated to a private corporation of its own creation; that the exercise of this power is not restricted by the provision that the right of trial by jury is inviolate, because a jury has never been considered essential to the exercise by the State of such inherent powers of sovereignty, as taxation, eminent domain, and the like; that the legislature might have made the award of the commissioners final and conclusive, giving to neither the railroad company nor the land owner any right of appeal or review, as was in fact done by the law of 1864; that as it had the discretion to withhold any appeal from the action of the commissioners, any re-examination of the amount of assessment by a jury, it had a right to grant such a review and re-examination upon such terms as it saw fit; and that giving the right of appeal, coupled with the privilege to the railroad company of taking possession *ad interim*, was a mere act of favor to the land owner, and not the enforcement of a constitutionally guaranteed right. Further, it is contended that if this privilege of entry pending the appeal is unconstitutional, then the whole matter of appeal must fall; because it is evident that such temporary possession was in the thought of the legislature, a condition of and an inducement to the giving of the appeal; that the land owner may not claim the privilege of appeal, and at the same time repudiate the conditions upon which the legislature has given it to him.

This question has been argued before us with an ability and zeal worthy of its importance. On the one hand, we have been urged to uphold this constitutional guarantee in its letter and spirit, in order that the land owner may be fully protected against the eagerness and greed of railroad corporations. And on the other hand, it has been pointed out that to sustain the views of the plaintiff would put it in the power of a single obstinate land owner to long delay the building of any railroad. We are fully sensible of the importance of the question, and have given it the most careful consideration. It is obvious that the question is not free from difficulty. At the present time there are pending before us two cases involving the same question, coming from two of the most learned, able and distinguished district judges of the State, upon which question they are divided; one sustaining the views of the present plaintiff in error, and the other the reverse. The question is for the first time presented in this court; for, while many cases involving the condemnation of the right-of-way have been before us, and while this question has been many times suggested to our minds, we have never been called upon to decide it, and have carefully refrained from expressing any opinion thereon. And now we remark in the first place, that while it is undoubtedly true that a statute may be constitutional in part and unconstitutional in part, yet as a general proposition, it has its limitations. The mere fact that the one part standing alone would be within the scope of the legislative power, does not prove that it can be upheld when coupled with other matter. If such other matter conflicts with the Constitution and must fall, then the constitutionality of the first depends upon the extent and closeness of its connection with the second. If the first be conditioned upon the second, or if it is apparent that the legislature would not have enacted the first but for the second; that the latter was, as it were, an inducement to the former, and that only by

virtue of a concurrence of the two, would it be presumed that in the judgment of the law making power, the respective rights of antagonistic parties would be preserved, then with the fall of the second falls also the first. It is not enough to say that the legislature might have legally enacted the first alone. When they have coupled the two together, the failure of the latter invalidates the former; and this, for the reason that because of the mutuality of the two, the relation *inter sese*, the dependence of the one upon the other, the correspondence of blessing and burden, it must be presumed that the one was an inducement to or a condition of the other; that the legislature would not have enacted one but for the other. As Cooley in his work on Constitutional Limitations says, page 179: "And if they are so mutually connected with and dependent on each other as conditions, considerations or compensations for each other as to warrant the belief that the legislature intended them as a whole, and if all could not be carried into effect, the legislature would not pass the residue independently; then if some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected, must fall with them."

This doctrine is fully sustained by all the authorities. In the case of Warren v. Mayor, 2 Gray, 84, Chief Justice Shaw, speaking for the Supreme Court of Massachusetts, thus states the rule: "It is no doubt true, as has been argued by the learned counsel for the prosecutors of this writ, that the same act of legislation may be unconstitutional in some of its provisions, and yet constitutional in others. It was so decided in the case of Fisher v. McGirr, just decided, in which it was held that all that part of the act of 1852 respecting the manufacture and sale of spirituous liquors, which authorized a seizure of liquors on the terms and in the manner there provided, was unconstitutional; and yet we are every term rendering judgments against persons for selling spirituous liquors contrary to other provisions of the same statute. There is no inconsistency in this. Such act has all the forms of law, as has been passed and sanctioned by the duly constituted legislative department of the Government; and if any part is unconstitutional, it is because it is not within the scope of legitimate legislative authority to pass it. Yet other parts of the same act may not be obnoxious to the same objection, and therefore have the full force of law, in the same manner as if these several enactments had been made by different statutes. But this must be taken with this limitation, that the parts so held respectively constitutional and unconstitutional, must be wholly independent of each other. But if they are so mutually connected with and dependent on each other, as conditions, considerations or compensations for each other, as to warrant a belief that the legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected must fall with them." See, also, Slauson v. City of Racine, 13 Wis. 398, in which Judge Paine thus discusses the question: "It is undoubtedly true that parts of a statute may be unconstitutional, and yet other parts, capable of being executed independently, held valid. But the counsel for the plaintiff contends that where parts of a statute are unconstitutional and other parts valid, the former being evidently designed as compensation for or inducements to the latter, so that the whole taken together warrants the belief that the legislature would not have passed the valid parts alone, then the whole act should be held inoperative. This position is fully sustained by the case of Warren v. Charleston, 2 Gray, 84, and it seems to us to rest upon solid reasons. We think, also, it is fairly applicable to this case. The first section of the act (ch. 83, Pr. Laws of 1856) provides that the tracts in question shall be annexed to the city. The second defines the new boundaries of the city, and then follows a proviso that the farming and agricultural lands annexed should be exempt from certain taxes, and should be taxed for city and ward purposes only at the rate of one-half of one per cent. There is no doubt that in many instances, by the annexation of farming lands to a city, hardships are inflicted upon their owners by the increased rates of taxation to which they are subjected. If they are annexed, they must be taxed as other lands in the city; and that is a matter proper to be considered by the legislature in determining whether they shall be annexed. In this act it is evident the legislature had it under consideration, and that they annexed these lands with the idea that they might protect them against such hardships by a proviso for a less rate of taxation. The proviso was clearly intended as a compensation for the annexation, and stronger language could not well be selected to show that the legislature intended the one to be subject to the condition stated in the other, and that they would not have annexed these lands unless they had supposed that effect could be given to the proviso. For these reasons we think the principle stated applies, and the act should be held inoperative."

See, further, the case of Meshmeier v. State, 11 Ind. 482, in which the court says: "The legislature pass an entire statute, on the supposition, of course, that it is all valid and to take effect. The courts find some of its essential elements in conflict with the Constitution, strip it of those elements and leave the remaining portion, mutilated and transformed into a different thing from what it was when it left the hands of the legislature. The statute thus emasculated is not the creature of the legislature, and it would be an act of legislation on the part of the courts to put it in force. The courts have no right thus to usurp the province of the legislature."

In Lathrop v. Mills, 19 Cal. 529, Judge Baldwin uses this language: "In order to sustain the ex-

cepted clause, we must intend that the legislature knowing that the other provisions of the statute would fall, still willed that this particular section should stand as the law of the land."

See, also, Reed v. Omnibus R. Co., 33 Cal. 212; Campau v. City of Detroit, 14 Mich. 275; State v. Wheeler, 25 Conn. 290; State, *ex. rel.*, etc. v. Dousman, 28 Wis. 541. It may also be added that we need never expect to find the connection or dependence expressed in the statute. The legislature never enacts laws upon the supposition that one part of them is in conflict with the Constitution and must fail; it always proceeds upon the supposition that all that it does is within its constitutional power. Hence it never in terms says that if one portion of its statute fails the other portion must also fail, nor that it rests one part upon the supposed validity of another part; it legislates as if all that it attempts to do was within its constitutional power; and when, in pursuance of its constitutional duty, the court ascertains that one part of its legislation conflicts with the Constitution and must fall, the inquiry is, not whether the balance of the statute is said by the legislature to depend and rest upon the unconstitutional part, but whether, in the nature of things, and by reason of the evident interdependence of the two, one upon the other, the courts can fairly say that the legislature intended the two to stand together as a single entity, the one dependent upon the other, or the one an inducement or compensation for the other, or the two together making a single compact and harmonious whole, and whenever that appears then the unconstitutionality of either invalidates both. With this statement of the rules by which the validity of statutes is to be determined, we pass to the consideration of the statute in question; and here it will be noticed that the statute of 1864 made the award of the commissioners final. When that award was made and the amount of the compensation by them determined paid or deposited, the right of the railway company was complete and the land owner was powerless to challenge the occupation by the company. For reasons heretofore suggested (the exercise of the right of eminent domain not being conditioned upon a jury trial) the legislature had the power to make the full exercise of the right of eminent domain close with the action of the commissioners. Under that statute no appeal was allowed, and upon the payment or deposit of the award of the commissioners by the railway company, its right of occupation became unchallenged. The law of 1868 changes the law of 1864 so far as to allow an appeal from the decision of the country board as to the value of the land appropriated. The law of 1870, which is the law under which these proceedings were had, provided for an appeal, but limited the scope and effect of the appeal as follows: "And an appeal shall be had from the determination of the board of county commissioners as to the value of the land, crops, buildings and other improvements on said land, and for all other damages sustained by such person by reason of such right of way so appropriated, in the same manner as appeals are granted from the judgment of a justice of the peace to the district court; and said appeal and all subsequent proceedings shall only affect the amount of compensation to be allowed, but shall not delay the prosecution of the work on said railroad, upon said company paying or depositing the amount so assessed by said commissioners with the county treasurer of the county within which the said lands are situated; and upon the payment, or deposit, as aforesaid, of the amount so assessed by said commissioners, and upon said company executing a bond with sufficient security, to be approved by the county clerk, to pay all damages and cost which said company may be adjudged to pay by said district court, said company may, notwithstanding said appeal, take possession of and use the said land, and construct its road over the same."

Now, it is obvious from this statute that the legislature never intended that an appeal from the assessment of damages should work any delay in the occupation of the land, or the construction of the road by the railroad company. Language could not be used which more clearly indicates the intention and thought of the legislature. "Said appeal, and all subsequent proceedings shall only affect the amount of compensation to be allowed, but shall not delay the prosecution of the work on said railroad." Could language make clearer the intent of the legislature? Would it not practically nullify that intent to uphold the appeal, and, at the same time, make the appeal operative to delay the occupation of the land and the construction of the railroad? Was not the railroad company equally with the landowner within the thought of the legislature and the intended protection of this statute? And may not the courts wipe out all of benefit and advantage to the one, and, at the same time, sustain the benefit and protection to the other? Beyond the letter of the statute we must also consider the ordinary facts of railroad building. Railroads are not initiated and railroad enterprises undertaken, with the large sums of money needed therefor secured, except upon the idea that such roads shall speedily and without interruption be pushed to completion. In many counties of the State district courts are held but twice a year. Can it be that the legislature intended all railroad enterprise in such counties should wait the tardy processes of appeal, continuances, trials in the district courts? Can it be supposed that the legislature would expect the investment of money in railroad enterprises with such certainties of delay, or the equivalent of submission to the exorbitant demands of any unprincipled and obstinate land owner? Is it not more consonant with fair dealing, and the presumption of honesty on the part of the legislature, that they coupled with protection to the land owner the rapid consummation of any intended railroad enterprise? Having regard to both the letter of the statute and the ordinary

facts of railroad building, we can not conclude otherwise than that the legislature intended that the appeal of the land owner should be conditioned and dependent upon the present occupation of the land by the railroad company, and the immediate completion of the railroad enterprise. Hence, within the principles so clearly and forcibly shown by the authorities heretofore cited, we are forced to the conclusion that the legislature based the appeal upon the condition of the present occupation by the railroad of the land; and that if such present occupation must fail by virtue of any constitutional inhibition then the appeal must fall, and the award of the commissioners must stand as the final arbitration and determination of the amount to be paid for the land appropriated.

This conclusion would necessitate an upholding of the ruling of the district court, and a judgment against the defendant in error. But we are not content to rest the decision of this case upon this possibility of denying the validity of the appeal, and so we pass to the consideration of the other question presented by counsel, and upon that we are forced to sustain the statute as a whole. We premise here that the right of eminent domain carries with it no constitutional guarantee of a jury trial. It is a power which may be exercised whenever the necessities of the public require, and in such manner and through such machinery as the legislature may see fit to prescribe, the only limitations thereon being the constitutional restrictions as to the time, kind and amount of compensation. The legislatnre may provide for a jury trial of the damages in the first instance, or it may withhold such a trial altogether and leave to any commissioner or court the sole and final determination as to the amount of damages. In Cooley's Constitutional Limitations, p. 563, the author says: "What the tribunal shall be which is to assess the compensation must be determined by the Constitution, or by the statute which provided for the appropriation. The case is not one where, as matter of right, the party is entitled to a trial by jury, unless the Constitution has provided that tribunal for the purpose." See also Mills on Eminent Domain, sec. 84 and 91; Plank Road Co. v. Pickett, 35 Mo. 531; Ross v. Comm., 16 Kan. 411.

The law of 1864, heretofore cited, and, was an exercise of this power; for, by it the legislature made the award of the commissioners final, gave no right of appeal, and provided for an appropriation of the right of way upon the payment or deposit of their award. Now if the legislature violates no constitutional provision in making the award of the commissioners final, if the land owner has no constitutional right to an appeal from such an award, it would seem to follow necessarily that that which the legislature may withhold altogether it may grant upon conditions. The appeal being a matter of favor and not a matter of right, the power that grants it may prescribe the terms upon which it shall be taken. How can it be held that a land owner who has no right to an appeal can, when one is tendered to him upon conditions, accept the tender and repudiate the conditions? Can he of his own volition enlarge the scope of a grant which is a matter of legislative favor? Many words can not make this clearer. The land owner's constitutional guarantee terminates with the award of the commissioners. The appeal is a favor, and carries with it all the conditions the legislature has seen fit to impose. An examination of the statute leaves no doubt as to the extent of these conditions. It provides that the appeal shall only be as to the amount of damages, and that it shall not delay the prosecution of the work. But we are met here with the objection that the appeal sets aside the award of the commissioners; that there then existed no adjudication of the amount of compensation; that upon the trial of the appeal it not infrequently happens that the jury award a much higher sum than the commissioners, and that if the railroad company be already in possession of the land, having constructed its road over it, it may result that the railroad appropriates the land without prior payment or deposit of the compensation. To that we reply that the land owner is under no obligations to appeal: his compensation has been determined by a competent and constitutional tribunal, and the amount of that compensation is paid or deposited for him, and hence he has no right to complain if of his own volition he initiates further proceedings. Secondly, the occupation of the railroad land pending the appeal is provisional merely; its entry is not a permanent appropriation of the right of way, and it acquires by such entry no vested rights. It takes upon itself all the risks of the final award by the jury on the appeal. If the verdict of the jury and the judgment of the court exceed the award of the commissioners, the railroad must promptly pay such increased amoun or the land owner may maintain ejectment. Railroad Co. v. Callender, 13 Kan. 390. Such provisional occupation by the railroad company is not an anomalous proceeding. A railroad company may by statute (Comp. Laws 1879, ch. 23, sec. 47) enter by its officers and agents upon the lands of any person for the purpose of examination and survey of its proposed route. In other words, in its behalf the law of trespass is temporarily suspended, or at least limited in its operation. It is true this is a trivial matter compared with the actual occupation of the land, and yet it is kindred in principle. Again, in replevin actions the claimant by giving a bond may obtain possession of the property pending a litigation, and this notwithstanding the fact that the final judgment may show that he never had any right thereto. Still, again, in many proceedings the court takes possession of the property in dispute, and places it in the hands of a receiver. All these possessions, entries and occupations are simply provisional, and while doubtless under cover of them the legislature may not defeat the land

owner's constitutional guarantee of compensation yet when that guarantee has once been secured to him he may not question the validity of subsequent provisional proceedings. Our conclusion therefore is, that so far as any question in the present case is involved, the statute as a whole is valid and must be sustained.

Before closing this opinion it may be proper to notice the various cases decided by this court which counsel seem to think conflicts with this decision, or the opinions which at least are thought to contain language inconsistent with the views herein expressed. The first case is that of the Railroad Company v. Weaver, 10 Kan. 344. That was an action for damages begun in a justice's court on the ground that the railroad company had constructed its road over the plaintiff's land and paid no damages therefor. The defense was that the land owner's only remedy was a proceeding under the statute to have his damages assessed. We decided against this claim, holding that the railroad company under the Constitution acquired no right until after it had initiated proceedings and paid or deposited the amount of the compensation awarded, and that in the absence of such proceedings and such payments or deposit, the land owner had all legal remedies against the company as against any other trespasser, and was not limited to the statutory proceedings for the assessment of damages. The next case is that of Railroad Company v. Ward, 10 Kan. 352, in which the railroad company sought to defend an action of trespass brought against it, by evidence of condemnation proceedings subsequent to the trespass, and we held that such condemnation proceedings did not relate backward or cure trespasses before they were had; that until the compensation money is paid or deposited, the railroad company acquires no rights and is liable for any trespass committed theretofore. Nothing in the language of the court in either of these cases, touches upon the validity of this section of the statute. It is true, the language referring to the constitutional provision is emphatic and decided, and we reiterate the same language here. Compensation in money, or by a deposit of money, must be made before the railroad company acquires any rights in the land. The next case is that of Railroad Company v. Callender, 18 Kan. 496. In that case it appeared that after the award of the commissioners, the land owner appealed, and on the trial in the district court recovered a much larger compensation than that given by the commissioners. Pending the appeal, the railroad company having deposited the amount of the award, but without giving the bond required by the statute, entered upon the land and constructed its road. After the recovery of judgment in the district court, the amount thereof not being paid, Callender having waited eight months, commenced his action in ejectment, and we held that such action could be maintained. In that case, even the provisional occupation by the railroad was not authorized by statute, the company having failed to execute the bond required as a condition precedent thereto. The validity of this section was not passed upon, it was assumed to be valid. The fact that the railroad company had not complied with its terms was noticed, and hence it was called a trespasser *ab initio*. We did not then think that even if the company had given the bond, the judgment should have been otherwise than it was, nor do we think so now. If, after the final adjudication of the amount of compensation, the railroad company fails promptly to pay the amount thereof, the provisional occupation ceases to be rightful, and the land owner may recover the possession of the land, as well as all damages for the injuries done thereto. The next case is that of Blackshire v. R. Co., 13 Kan. 514. In that case the land owner appealed and recovered a larger amount in the district court than had been awarded by the commissioners. The railroad company had deposited that amount with the county treasurer. Pending the appeal the treasurer defaulted, and the railroad company sought to have the amount deposited with him credited upon the judgment in the district court, claiming that the money while in hands of the county treasurer was at the risk of the land owner. We dissented from this claim, and held that it remained there at the risk of the railroad company. Considerable stress has been laid upon this case, as though the argument made by the court in its opinion in support of the conclusion there reached committed it to different views of the question now before us than those we have here expressed; but the scope of the argument made in that case will be better understood when we bear in mind the claim of the railroad company. It was, substantially, that, when the company had deposited the amount of the commissioner's award, the money became the money of the land owner, and the land the property of the railroad company. And the company also claimed that whatever further proceedings might be authorized, the title to neither land nor money was affected thereby, and hence that the money, while it remained in the hands of the county treasurer, so remained at the risk of the land owner. In the opinion we endeavored to show that there was no final appropriation of the land, and that the title did not pass until the full amount finally adjudicated to be the compensation was paid or deposited; that the appeal, like the appeal from the judgment of a justice, vacated the award and left pending no adjudication upon which the company could base title. We shall not restate the argument then made. We have reviewed the question again, and, notwithstanding the argument of the counsel for defendant in error, we think the argument then made was sound, and the conclusion reached in that case correct. We think now as then, that there is no final appropriation of the right of way until that compensation, which, as a final result of all litigation by appeal, error, or otherwise, is adjudged to be full and complete, is

paid. Up to that time all occupation which may be permitted is merely provisional. Yet, while the title to the right of way does not finally pass till the end of the litigation, yet the constitutional guarantee is satisfied when the award of the commissioners is made and deposited. The railroad company may not question the land owner's right of appeal because the legislature has the power to give it. If the land owner does not appeal at the end of ten days, the title to the land and the money is respectively transferred; but if he does appeal and avail himself of the privileges granted by the legislature, he takes them *cum onere*. See, also, as to the matter of appeal, the case of R. Co. v. Hammond, 25 Kan. 208. This same idea of no final appropriation of the right of way, no absolute transfer of title until the end of all litigation as to the amount of compensation, is recognized in the case of R. Co. v. Wilder, 17 Kan. 289. The last case referred to is that of City of Kansas v. R. Co., 18 Kan. 234. That was a case in which the City of Kansas attempted to open a street and condemn land therefor. The statute referred to authorized an appeal from the award of the householders, but nowhere authorized any possession of the land sought to be condemned, pending the appeal. Hence we held, and we think, very correctly, that pending such appeal, as the statute gave no right of temporary occupation, the city had none. These are all the cases to which we have been referred by counsel, in which any expression or conclusion is thought to appear antagonistic to the views expressed in this case. We see nothing that conflicts; and we certainly intended in those various cases to avoid any decision of the question now presented. Authorities upon this question can not be expected directly in point, in view of the difference between our Constitution and that of other States, and yet there are one or two authorities which deserve to be cited. See the case of Peterson v. Ferreby, 30 Iowa, 327, in which the court uses this language:

"The views herein expressed are not in conflict with the Constitution, which provides that 'private property shall not be taken for public use, without just compensation first being made, or secured to be made, to the owner thereof, as soon as the damages shall be assessed by a jury.' Const., art. 1, sec. 18. The property is not taken in an absolute sense, until the amount assessed upon appeal is paid. If the appellate jury in this case shall assess less than the sheriff's jury have assessed, the amount is secured to plaintiff, being in the sheriff's hands; if they shall assess more, the plaintiff can, by injunction, prevent the absolute appropriation of his property, until the increased sum is paid." Richardson v. Des Moines Valley R. Co., 18 Iowa, 260. "In either event the land owner is fully protected. We are clearly of the opinion that the money paid the sheriff should remain a deposit in his hands until the damages are fully assessed in the appellate court. The demurrer to the answer of defendant was improperly sustained." See also the case of Doughty v. Railroad Co., 1 Zabriskie, (N. J.) 445, in which Randolph, J., says: "But if the legislature have a right to say that a tender of the amount found by a jury shall be considered compensation, they might also have the right to say that a tender of the amount awarded by the commissioners will have the same effect, and the additional trial allowed can not render that unconstitutional which before was constitutional." We have given this question the fullest consideration, and our conclusion upholds the validity of this statute. We think the constitutional guarantee has been satisfied by it both in letter and spirit; that the rights of the land owner are protected, and at the same time no unreasonable obstruction placed in the way of railroad enterprises. It follows therefore that the judgment of of the district court was correct and it must be affirmed, and it is so ordered.

All the justices concurring.

WEEKLY DIGEST OF RECENT CASES.

GEORGIA, ... 6
INDIANA, ... 9
KANSAS, ... 1, 3, 15, 18
MARYLAND, ... 20, 21
NORTH CAROLINA, ... 5
OHIO, ... 10, 14, 17
VERMONT, ... 4, 11
FEDERAL CIRCUIT COURT, 2, 7, 8, 12, 13, 16, 19

1. ATTACHMENT — CUSTODIA LEGIS — CUSTODY OF AN INDIVIDUAL UNDER BOND.

Where property is held by an individual under a bond given in judicial proceedings for the re-delivery of the specific property, it is to be deemed in *custodia legis*, the same as if it had continued in the possession of the officers. *McKinney v. Purcell*, S. C. Kan., September, 1882, Judges' Headnotes.

2. ATTORNEY AND CLIENT—SETTLEMENT BY CLIENT —CHAMPERTY.

1. Plaintiff has the right to settle a suit brought to recover damages for a personal injury without the consent of his attorneys, and where he does so, the controversy must be regarded as at an end, and the suit must be dismissed. 2. Whether a contract between attorneys and the client, whereby, in the event of their success in an action for the recovery of damages, they are to receive, as compensation for their services, one-third of the amount which may be recovered, is champertous, not decided. *Swanston v. Morning Star Mining Co.*, U. S. C. C., D. Colorado, June 19, 1882, 13 Fed. Rep., 215.

3. BANK—FIDUCIARY DEPOSIT—RIGHT OF ATTACHING CREDITOR.

1. While the relation between the bank and its depositor may be that merely of debtor and creditor, and the balance due on the account may be only a debt, yet if the money deposited belongs to a third person and is held by the depositor in a fiduciary capacity, its character is not changed by being placed to his credit in his bank account or mixed with other moneys deposited in his own

name, and when the principal and equitable owner of the funds asserts his right to the money before repayment to the depositor, neither an attaching, nor a garnisheeing creditor is entitled to have it applied to satisfy the debt or judgment of the debtor. 2. Where a person holds a fund for the use and as the property of his principal, it is not subject to garnishment by his judgment creditors, when the bank and creditor have notice of the principal's ownership in the fund, although such person deposits the fund in a bank in his own name. *Morrill v. Raymond*, S. C. Kan., September, 1882, Judges' Headnotes.

4. CONTRACT—CONDITIONAL SALE OF PERSONALTY IN FORM OF LEASE—RECORD.

1. *Held*, that a certain written contract, attempted to be disguised under the form of a lease, where the rent for one year was equal to the value of the organ sold, was a conditional sale; and that, as such, it should have been recorded, to prevent an attachment of the organ by the vendee's creditor, he having had no notice that it was a conditional sale. 2. The defendant, a sheriff who attached the organ, although put upon inquiry because he found it in the possession of a third party, was not defeated of the right to make the attachment, as it did not appear that he would have learned of the conditional sale by inquiry. *Whitcomb v. Woodworth*, S. C. Vt., January Term, 1882, Reporter's Advance Sheets.

5. CONTRACT—CONSIDERATION—PROMISE TO PAY DEBT DISCHARGED IN BANKRUPTCY.

1. A promise to pay a debt discharged in bankruptcy, made to an agent of the creditor, is a promise to the creditor himself, and competent to remove the bar. 2. Where the debtor had said: "The debt is an honest one — I always intended to pay it:" *Held*, that it was for the jury to say whether the debtor intended to promise to pay the debt, notwithstanding his discharge in bankruptcy, and a non-suit was error. *Shaw v. Burney*, S. C. N. C., February Term, 1882, 6 Va. L. J., 576.

6. CONVEYANCES—DEED ABSOLUTE IN FORM PASSES TITLE—SUBSEQUENT JUDGMENT.

1. An absolute deed, though made as a security for a debt, passes title, and a judgment subsequently rendered against the grantor has no lien upon the land that can be enforced by levy and sale, until the title be revested by redemption in the grantor. The debtor himself may redeem, or his creditors may, but until legal redemption the legal title is out of the debtor. 2. While we hold that at law a creditor can not subject the equity of redemption of his debtor to property, the legal title to which such debtor has parted with, yet we do not intend saying that in another forum he would necessarily be remediless. *Graves v. Williams*, S. C. Ga., Sept. 19, 1882.

7. CONTRACT—INTERPRETATION—"CURED MEAT."

Where a sale of "cured meat" was made by a broker to a merchant at Memphis, that term is to be interpreted according to the understanding of the trade at Memphis, and not according to that where the seller resided, if there be any substantial difference between the two. *Treadwell v. Anglo-American Packing Co.*, July 26, 1882; 13 Fed. Rep., 22.

8. CORPORATION—FAMILY COMBINATIONS—EQUITABLE RELIEF—STOCKHOLDER.

It is sufficient ground for equitable interference that complainant, who is a stockholder of a corporation, alleges that the officers of the corporation, who are members of one family and own a majority of the stock, have combined to appropriate the profits of the corporation in the form of salaries, and through a contract with a firm of which they are members, and have also combined to keep complainant in ignorance with regard to these transactions. *Sellers v. Phœnix Ins. Co.*, U. S. C. C., E. D. Pa., July 1, 1882; 13 Fed. Rep., 20.

9. DESCENTS AND DISTRIBUTIONS—PROCEEDS OF LIFE POLICY.

John A. Wilburn took out ten policies of insurance on his life for the benefit of and payable to his legal heirs. The contention is between the widow and children of said Wilburn as to the proper distribution of the money realized from the policies, the widow claiming one-third, and the children conceding her right to one-twelfth. Policies of insurance payable to designated beneficiaries are not the property of the decedent within the meaning of the statutes of distribution. The beneficiary has the exclusive right to the money realized. 65 Ind. 345. He alone has the right to assign or surrender it. 36 Conn. 132; 7 Robert, 155. The contract, and not the statutes, fixes the rights of the beneficiaries. Where a benefit is granted to several, and the respective proportions are not specified, the beneficiaries take equally. 2 Phil. Ch. 555; 5 Met. 328. The widow's rights were those of an heir, and by the contract all the heirs are to share alike. *Wilburn v. Wilburn*, S. C. Ind., Sept. 20, 1882.

10. EVIDENCE—FORGERY OF DEED—POSSESSION OF OTHER FORGED DEED.

On the trial of a person accused of uttering and publishing a forged deed for the conveyance of real estate, with intent to defraud, other forged deeds for the conveyance of real estate, including deeds of trust, made to a trustee to secure the payment of promissory notes or bonds, found in his possession, or proved to have been uttered or published by him, are competent testimony to show the guilty knowledge of the accused. *Lindsay v. State*, S. C. Ohio, Sept. 26, 1882.

11. EVIDENCE—LOST RECORD OF JUDGMENT—PAROL EVIDENCE.

In an action of book account the defendant claimed that some part of the plaintiff's account was merged in a judgment; that the judgment was rendered by a justice of the peace; that the justice had deceased; that there was no record nor files of the judgment in the county clerk's office or the possession of the administrator. *Held*, that parol evidence was admissible to prove such facts; and that it would be presumed that the justice made a record of the judgment. *Dickerman v. Chapman*, S. C. Vt., March Term, 1882, Reporter's Advance Sheets.

12. FEDERAL COURTS—FOLLOW STATE DECISIONS—ORGANIZATION OF CORPORATIONS.

The Federal courts are bound by the decisions of the appellate court of a State in questions involving the construction of the statute law of the State, and the rule is applicable to a decision of such appellate court upon the legal existence of a corporation organized under the laws of the State. *Mooney v. Humphrey*, U. S. C. C., D. Col., June, 1882, 14 Rep., 354.

13. FEDERAL COURTS—JURISDICTION—COLLECTION OF STATE TAXES—RECEIVER.

The jurisdiction of the Federal courts does not extend to the appointment of a receiver to collect taxes levied by a county court to pay interest on

county railroad bonds. *Thompson v. Allen County*, U. S. C. C., D. Ky., July, 1882, 14 Rep., 356.

14. FRAUD—FALSE REPRESENTATIONS—PRINCIPAL AND SURETY.

Where a principal debtor, by falsely and fraudulently representing to the creditor that his surety has consented to an extension of time for payment, procures from the creditor an agreement for such extension in consideration that interest be paid, such agreement is, as to the creditor, fraudulent, and he may, upon discovery of such fraud, even after the period of extension has expired, repudiate such agreement and sue upon the original contract without refunding or tendering back the interest paid under such invalid agreement. *Bebout v. Bodle*, S. C. Ohio, September 26, 1882.

15. INSOLVENCY—RIGHT OF DEBTOR TO PREFER A CREDITOR.

A debtor has the right to prefer one creditor over another, and the vigilant creditor is entitled to the advantage secured by his watchfulness and attention to his own interests. A debtor acting in good faith and without an intention to defraud, may execute a chattel mortgage upon his personal property to secure a particular debt due one creditor, pending an action by another creditor to secure a judgment against him. *Randall v. Shaw*, S. C. Kan., September, 1882, Judges' Headnotes.

16. JUDICIAL SALE—RIGHT OF PURCHASER TO DEMAND GOOD TITLE.

At a sale of land at public auction by an officer of the court, where the title to the land was acquired by the defendant under the following devise in a will: "I bequeath to my daughter [the land in question] for her and her children's sole and separate use, free from any claim or control of her husband,"—and the purchaser at the sale declined to comply with the terms of his purchase, alleging a defect of title: *Held*, that a title acquired by such a devisee is not of such a clear and indisputable character as the purchaser has a right to demand, and that a court of equity will relieve the purchaser from complying with his bid made at the sale. *Dunscomb v. Holst*, U. S. C. C., W. D. Tenn., June 21, 1882, 13 Fed. Rep., 11.

17. JURISDICTION—FORGERY—INSTRUMENT FORGED WITHOUT THE STATE AND UTTERED THROUGH INNOCENT AGENT.

1. On a charge of uttering and publishing a forged instrument with intent to defraud (Rev. Stat., sec. 7091), the place where the instrument was uttered and published and not the place where the forgery was committed, determines the jurisdiction of the court over the accused. 2. If the forged instrument has been uttered and published in this State with intent to defraud, by means of an innocent agent here, it is no defense to an indictment in the proper county in this State, to show that the accused was never within the State, or that he owes allegiance to another State or Government. *Lindsay v. State*, S. C. Ohio, September 26, 1882.

18. MORTGAGE — OF REAL ESTATE — NEGOTIABLE NOTE SECURED BY—RECORD.

Where a real estate mortgage is executed to secure the payment of a negotiable promissory note, such mortgage will so far partake of the negotiable character of the note, that whenever the note is transferred by indorsement before due, so as to free it from all equities existing in favor of the makers of the note, or of prior indorsers, the mortgage will also be freed from such equities. But until the mortgage is recorded, such transfer will not prevent a third person, who has no notice of the mortgage or transfer, from purchasing the mortgaged property, and thereby obtaining a full and absolute title to the property, free and clear from the mortgage lien. But when the mortgage is recorded, its negotiable character is then extended even to *bona fide* purchasers of the property, and it retains such character contemporaneously with the note to which it is an incident so long as the note remains unsatisfied and negotiable, or until the mortgage is released of record by the mortgagee, or his attorney, assignee or personal representative; and that when the mortgage is so released, it then loses its negotiable character to the extent that any third person who may then purchase the property in good faith will obtain full, complete and absolute title thereto, free from all equities, liens, interests, trusts or incumbrances existing in favor of any holder of the note and mortgage, whether the note is satisfied or not. *Lewis v. Kirk*, S. C. Kan., September, 1882; Judges' Headnotes.

19. SALE—DELIVERY—BILL OF LADING WITH DRAFT ATTACHED.

Where goods are sold and delivered to a carrier, with bill of lading in the name of the shipper indorsed to the purchaser, to be delivered only when the draft is paid, the ownership remains with the seller until the draft shall be paid, and the goods are at his risk. But when the payment is made, the ownership and risk change to the purchaser. *Treadwell v. Anglo American Packing Co.*, U. S. C. C., W. D. Tenn., July 26, 1882; 13 Fed. Rep., 22.

20. TRUST—RIGHT OF TRUSTEE TO APPEAL.

Where a fund arising from the sale of mortgaged property is brought into court for distribution among creditors and persons entitled to the same, the trustee, whose commissions have been allowed, has no right to appeal from an order directing the payment of a claim against such fund. *Stewart v. Codd*, S. C. Md., March 3, 1882, 58 Md. 86; Reporter's Advance Sheets.

21. WILL—SECRET TRUST—LETTER TO RESIDUARY LEGATEES.

The testatrix, desiring to devote the bulk of her estate to the furtherance of religious, educational and benevolent objects, and being apprized of the difficulty of legally reaching the ends proposed through express provisions in her last will and testament, made in her will an absolute and unconditional gift of her residuary estate to three persons, leaving also a letter of instructions to these residuary devisees and legatees. In this letter, which is not attested and is not referred to in the will, she said she relied upon them, immediately upon her deceased, to take such measures as might be necessary to accomplish her wishes. She had been told that the devisees and legatees could spend every dollar in any way they saw fit, and that she must rely on their good faith and sense of right. The plaintiffs brought this action to set aside the residuary clause in the will, claiming that the letter of instructions is to be construed together with the will, and that the whole form part of one plan to accomplish an illegal purpose, and that the devisees and legatees of the residuary estate take the same under unlawful and void trusts, and therefore, so far as the residuary clause is concerned, it is a fraud upon the heirs at law and next of kin. *Held* that the se-

cret and unlawful trust, as alleged, is not established, and that the residuary clause of the will is valid as a devise and bequest. *O'Hara v. Dudley*, S. C. N. Y., September 13, 1882, 22 Dailey Reg. 561.

RECENT LEGAL LITERATURE.

AMERICAN MINING LAW. Manual of American Mining Law as practiced in the Western States and Territories. Embracing a Compilation of the Text of the United States Statutes, Land Office Regulations and Decisions, and the Local Statutes of California, Colorado, Nevada, Dakota, Washington, Wyoming, New Mexico and Arizona. By W. P. Wade. St. Louis, 1882: F. H. Thomas.

The scope and purpose of this convenient and valuable little volume is apparent from its title page. As a compilation it is faithful and thorough, and will, we fancy, be found more available to the professional reader than a text book on the same subject, in view of the fact, which finds expression in the preface, that American mining law is, as yet, hardly ripe for elaborate treatment in a standard text book.

INDIANA PRACTICE, PLEADINGS AND FORMS. Adapted to the New Revised Code of Indiana, with a full citation of all the latest Adjudicated Cases in Indiana, and Numerous Authorities under the Practice of the Common Law and in Equity, and under the Codes of Other States. By John D. Works. Vol. 1. Cincinnati, 1882: Robert Clarke & Co.

This work is very satisfactory, both in plan and manner of execution. To meet the needs of the younger members of the profession, the statement of principles is full and comprehensive; while for the sake of those of the profession who care little for general discussion or the reasoning or opinions of the author, a full citation of authorities will be found in the book, the subjects being well classified and divided so as to be easily accessible. The work will, we think, be found indispensable to the Indiana practitioner.

LEGAL EXTRACTS.

THE LABOR LAWS.

In these days of trades-unionism, strikes and constant conflicts between capital and labor in almost every branch of the industries of this kingdom, it is interesting to turn back to statutes the existence of which is generally unknown, and to see how such matters were dealt with by Parliament in early times. In the reign of Queen Elizabeth (1562) a statute was passed which repealed all existing statutes dealing with the subject of the labor laws, and which was intended to codify the whole law concerning the employment of artificers, laborers, servants of husbandry, and apprentices. From the recital it appears that an amendment of the existing laws was thought necessary for several reasons, but chiefly "that the wages and allowances, limited or rated in many of the said statutes, are in divers places too small and not answerable to this time respecting the advancement in prices of all things belonging to the said servants and laborers;" and the recital concludes with the words that "there is good hope that it will come to pass that the same law (being duly executed) should banish idleness, advance husbandry, and yield unto the hired person, both in the time of scarcity and in the time of plenty, a convenient proportion of wages. The statute itself contains what is intended to be a complete code of the orders regulating all kinds of labor, of which the following may be taken as affording the best examples and the most striking contrasts to the state of affairs at the present day. Section 12 provides that all artificers and laborers being hired for wages by the day or week shall, betwixt the months of March and September, be and continue at their work at or before five of the clock in the morning, and continue at work and not depart until betwixt seven and eight of the clock at night (except it be in the time of breakfast, dinner or drinking, the which times at the most shall not exceed two and a half hours in a day), upon pain to lose and forfeit one penny for every hour's absence, to be deducted out of his wages that shall so offend. Section 13 provides that anyone who shall be lawfully retained in and for the building or repairing of any church, house, ship, mill, or every other piece of work taken in great, or gross, shall not depart (unless it be for nonpayment of his wages) until the same be finished, upon pain of imprisonment for one month, and the forfeiture of the sum of five pounds to the person from whom he shall so depart. Perhaps, however, the most remarkable of all the provisions of this statute is that contained in section 15, which provides for the regulation of the price of labor. It enacts that the justices of the peace of every shire, riding, and liberty within the limits of their several commissions, and the sheriff of that county, if he conveniently may, every mayor, bailiff, or other head officer within any city or town corporate, shall before the 10th June next coming, and afterwards shall yearly at every general session first to be holden and kept after Easter, assemble themselves together, and they so assembled calling unto them such discreet and grave persons of the said county, or of the said city or town corporate, as they shall think meet, and conferring together respecting the scarcity or plenty of the time and other circumstances necessarily to be considered, shall have authority within the limits of their commissions, to limit, rate, and appoint the wages of all servants and workmen whose wages in time past hath been by any law or statute rated and appointed. The section

further provides for proclamation to be made of the rates of wages in the various districts when approved by the lord chancellor. No better instance could, we venture to think, be found of the extraordinary difference existing between the present state of society and that existing three hundred years ago. No single person could now probably be found who would wish to return to a state of things suggested by this statute of Elizabeth; still, as a matter of history, it is interesting to rake it up. It affords a striking contrast between England in the reign of Victoria and England in the reign of Elizabeth, and affords ample occupation to the thoughtful mind in tracing the causes which have produced such a change, and in prophesying the result to which such a change will tend.—*Law Times.*

A DISTINCTION THE LAW SHOULD RECOGNIZE.

Railroad collisions are unnecessary. Crossing accidents are probably not avoidable, so far as the railway company's power is concerned, until crossing of tracks or highways on grade are superseded as they ought to be by bridges. For so long as there are such crossings the power of the company can not always guard against the contributory negligence of passers by. But it is otherwise with collisions of trains. There seems to be ample foundation in theory and in experience for the prevalent opinion that adequate mechanical arrangements and service, with proper supervision, can prevent all collisions. In other words, collisions are due to the neglect to adopt the best methods. The law is well settled that the carrier owes to his passengers an absolute duty to exercise the highest skill in providing a roadworthy vehicle; and this rule, the expression of which smacks of the old stage coach days in which it originated, ought to be applied to the entire apparatus of the route and its administration. It is very well, perhaps, to hold that the absence of a flagman may not be negligence, where the question arises on the injury of a stranger. But where the question arises on the injury of a passenger, the neglect to provide a signal man, or adopt the block system, or any other feasible and effectual preventive, is as truly a breach of the carrier's duty as for the owner of a coach to omit to provide a nut for the axle or a buckle for the harness. Evidence that the road might practically have been managed on a known system, which would have avoided a collision, ought to be decisive in favor of an injured passenger. The statute which limits the recovery of damages for causing death fixes an arbitrary limit of $5,000. This was very well thirty-five years ago, when the statute was adopted; but it ought to be doubled now. Human life ought to go up in value, as well as beef and real estate. But there should be no such arbitrary limit on a recovery against a carrier for the death of a passenger, consequent on the carrier's neglect of any known precaution. The power of juries is not unlimited or arbitrary. The court may set aside an excessive verdict. It would be a wholesome and needed restraint to abolish that limit in actions brought against a crrier by the representatives of a deceased passenger.—*New York Daily Register.*

FRENCH JUSTICE.

The circumstances of the recent Fenayrou trial at Versailles, as reported in the daily papers, have brought into prominence several peculiarities of French criminal law. In the first place may be noticed the separate interrogation of the three prisoners, followed by the wife's confession, extorted from her in the course of a railway journey by the chief of the detective force—a proceeding without which the crime would probably have never been traced, but one nevertheless hardly compatible with English ideas of justice. Another distinctive feature is the manner in which the antecedents of the prisoners were traced back to their early days, although some of these, as for instance the particulars of the woman's intrigue with Grousteau, could throw no light whatever on the murder. Equally strange to our ears sounds the judge's interrogation of the prisoners, and the opening harangue in which he takes their guilt as proved. Then, again, it will be observed, there is no cross-examination by counsel for the defense, and no summing up by the judge, the latter proceeding having been suppressed by the legislature in 1880 in consequence of the universal bias shown by the bench against the accused. A further peculiarity is the withdrawal of the prisoners from the court before the verdict is delivered and until sentence has been pronounced, the object of this practice being, it is said, to prevent disturbance by the prisoners' cries for mercy. The finding of "extenuating circumstances" in the case of two of the prisoners is hardly to be wondered at, for such verdicts are proverbially given in France on most slender pretexts; and still less surprising is the inevitable appeal to the Court of Cassation on the ground of some technical informality in the trial. Finally, we may remark the appearance in the case of the victim's family, as what is termed the *partie civile*, with a heavy claim for pecuniary damages; their motive being, it is stated, not so much the recovery of the sum demanded, as for the opportunity for their advocate to denounce the murderers. Can it, on the whole, be said that the French procedure supplies a model after which our own may be reformed?—*Law Times.*

NOTES.

——"Is it law you're talking about? Look, now, when I was a soudger I shot twenty men for the Queen, and she gave me a pinshun; but if I was only to shoot one stray fellow for myself, dedad, I'd be tried for murder. There's law for yez."